

**HIGH COURT OF MADHYA PRADESH : JABALPUR**  
**CRIMINAL APPEAL NO. 390 OF 1996**

Bhagirath

- V/s -

State of M. P.

**Present : Hon'ble Shri S. K. Palo; J**

.....  
**None appears for the petitioner.**

**Shri Ramji Pandey for the respondent /State.**  
.....

**J U D G M E N T**  
**(5/05/17)**

This appeal has been preferred under Section 374 (2) of Cr. P. C. 1973 challenging the judgment dated 14/02/96 passed by the Additional Session Judge, Tikamgarh in S. T. No. 104/93, whereby the appellant Bhagirath has been convicted for offence U/s 376 of I.P.C. and sentenced to undergo 7 years R. I. with fine of Rs. 2000/- and in lieu of fine R. I. for three months.

2. Law clearly expects the appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial Court in the judgment but by cross-checking the reasoning of the evidence on record. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place, when the appeal is posted for hearing. This is the requirement of the Code of Criminal Procedure on a plain reading of sections 385-386 of Cr.P.C.

3. The law does not enjoin that the Court shall adjourn the case

if both the appellant and his lawyer are absent. In the case of **Bani Singh and Others Vs. State of U.P., AIR 1996 SC 2439**, the Apex Court while dealing with similar situation held that when appellant and his lawyer are absent on the appointed day for hearing, the Court is not bound to adjourn the case, but should dispose of the appeal on merits. The dismissal of appeal simpliciter for non-prosecution is not contemplated U/s 386 of Cr. P. C.

4. In a similar case of **K.S. Panduranga Vs. State of Karnataka, 2013 Cr.L.J 1665** the Apex Court has held that it cannot be said that the Court cannot decide a criminal appeal in the absence of the counsel for the accused, even if the counsel does not appear deliberately or shows negligence in appearing.

5. The present criminal appeal is pending since 1996, but none appeared on behalf of the appellant. Therefore, in view of aforesaid enunciation of law, the appeal is being decided, on merit.

6. It is not disputed that the accused appellant is the cousin brother of the prosecutrix PW-3. Agricultural land of the accused and house of father of the prosecutrix are adjacent to each other and there was dispute between them regarding the land. The Prosecutrix PW-3 is a married woman.

7. As per the prosecution story, prosecutrix PW-3 on the date of incident was walking to the field from her home to pluck tomatoes. While, she was plucking the tomatoes, appellant came from behind caught her, gagged her and took her to the tapariya (hut) and committed sexual intercourse. She raised alarm and tried to resist. Her bangles were broken, buttons of blouse were broken. The appellant tried to strangulate her, therefore, she could not cry. Dhunda PW-5 who was going to Laxmanpura from his village Dariya on hearing the noises, came to the scene of the crime. Thinking that Dhyani, the father of the prosecutrix was beating his

wife entered into the Tapariya (hut) and saw the accused committing the crime. The accused fled from the scene. Prosecutrix went to her home and narrated the incident to her brother Kodora PW-1. When her father Dhyani came from the other village, she narrated the incident to him. Subsequently, along with her father and brother, she went to the police station, Tikamgarh to lodge the report Ex. P-3. She was sent for medical examination and she was advised to be examined by the E. N. T. Specialist by Dr. Usha Nuna PW-2, the lady Medical Officer who attended her during the course of investigation. The broken bangles were seized from the spot and charge-sheet has been filed.

**8.** The accused abjured guilt and pleaded innocence. He pleaded that because of the enmity regarding dispute of land, he has been falsely implicated. He has also taken the defence by saying that the prosecutrix was plucking tomato from his field and he admonished her. He has also taken the plea that the prosecutrix was a consenting party. In support of the defence, he has examined three defence witnesses.

**9.** The learned Trial Court having recorded the evidence of the prosecution and defence witnesses, pronounced the impugned judgment and held the accused/appellant convicted for offence U/s 376 of I.P.C. The trial Court imposed the sentence as mentioned above. The trial Court also awarded a compensation of Rs. 1,500/- to the prosecutrix on deposit of the fine amount.

**10.** The appellant has challenged the said judgment on the ground that he has been falsely implicated. The impugned judgment and conviction is contrary to law and facts and circumstances of the case.

**11.** Learned Panel Lawyer for the respondent/State submits that the appellant has been rightly held guilty and the conviction and sentence arrived at by the trial Court do not call for any interference.

**12.** Perused the record and the judgment impugned.

**13.** On close examination of statements of the prosecutrix PW-3

and Dhunda PW-5 is necessary for proper appreciation of evidence. The prosecutrix PW-3 is a married woman. She admits that she was over-powered by the accused. She also states that she was forcefully taken into the hut and thrown on the ground. The appellant committed sexual intercourse with her. She says that the accused pulled her Dhoti and petty-coat towards the upper side of body and committed the crime.

**14.** Dhunda PW-5 was passing through the hut. According to him, he heard certain shirk, thinking that Dhyani, the father of the prosecutrix is beating his wife, he entered into the hut. He found the prosecutrix covered her clothes below her waist. This indicates that she had no clothes on the upper part of her body. The appellant fled from the spot. She told Dhunda PW-5 that the accused thrown her on the ground and committed sexual intercourse. The version of the prosecutrix is not reliable as she says that the accused has only pulled her petty-coat to upper part but according to Dhoonda PW-5, she was only covered upto the waist.

**15.** The prosecutrix PW-3 also says that when the appellant committed the crime, her bangles were broken. She also admits that she sustained injuries on her forehead and on her back when the accused caught her neck. She sustained injuries of his nail. The injuries become blue, because of the nail mark. She could not speak properly. The lady Doctor Dr. Usha Noona PW-2 examined the prosecutrix was posted at the District Hospital Tikamgarh. According to her, the prosecutrix had no injuries on her body. In her opinion, no definite opinion can be given as regarding sexual intercourse. The prosecutrix is a married woman and habitual to sexual intercourse. She referred the prosecutrix for further examination. E.N.T. Specialist Dr. N. K. Chourasiya PW-8 examined the prosecutrix and submitted a report Ex. P-8.

**16.** According to him, the throat of the prosecutrix was slightly red and there was swelling internally but she was not having difficulty in respiration and nor any difficulty in eating food. He

has stated that no injury is found. He admits the pain she was suffering from the throat may be due to infection in the throat.

**17.** Kadora PW-1 is the brother of the prosecutrix PW-3. Kadora PW-1, prosecutrix PW-3 and Dhoonda PW-5 admit that agricultural land of the appellant and that father of the prosecutrix Dhyani are adjacent to each other. The prosecutrix and her brother also admit that there has been a dispute of land between Dhyani and the appellant since last two years. The appellant is the cousin brother of the prosecutrix. According to Kadora, the appellant is son of his uncle (Chacha).

**18.** The prosecutrix is a grown up married woman. Had there been any resistance, there could have been certain mark of injuries on her body. No doubt, she admits that she has received injuries in her testimony but the medical report does not support her version. Injury alleged to have caused by the appellant during the crime is neither external nor internal. The evidence of Dr. Usha Noona PW-2 and Dr. N. K. Chourasiya PW-8 does not support the prosecution story.

**19.** In the case of **Peeru Vs. State of M. P. 1996 J.L.J. 132**, it has been held that once the Court comes to the conclusion that the consent is obvious on record and the age can safely be inferred to be more than 16 years at the time of incident, in view of the circumstances mentioned above, the charge U/s 376 of I. P. C. cannot be sustained.

**20.** Harlal DW-1, Chhakilal DW-2 and Muliya DW-3 were examined by the defence. They narrated that no such incident has taken place and there has been a dispute between Dhyani, father of the prosecutrix and the appellant regarding the land. They further claimed that Dhyani wanted to acquire the land of the appellant.

**21.** Even though, defence evidence cannot be believed for sure, but the prosecution evidence does not seem to be convincing. When two views are possible, the view favourable to the accused has to be accepted.

**22.** Keeping in view the above circumstances, it can be inferred

that the benefit of doubt has to be given to the appellant. Therefore, this appeal is allowed.

**23.** Appellant is acquitted of charges for offence U/s 376 of I. P. C. His bail bonds are discharged.

**24.** With the aforesaid, the appeal stands allowed and disposed of.

**(S. K. Palo)**  
**Judge**

Vy/-